UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v. 18 Cr. 328 (KPF)

ANILESH AHUJA and JEREMY SHOR,

Defendants. Decision

----------x

New York, N.Y.
December 17, 2021
9:40 a.m.

Before:

HON. KATHERINE POLK FAILLA,
District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: ANDREA M. GRISWOLD
JOSHUA A. NAFTALIS
Assistant United States Attorneys

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Attorneys for Defendant Anilesh Ahuja
BY: RICHARD TARLOWE
ROBERTO FINZI
DAVID P. FRIEDMAN

KIRKLAND & ELLIS LLP
Attorneys for Defendant Anilesh Ahuja
BY: JOHN P. DEL MONACO

WEDDLE LAW PLLC
Attorneys for Defendant Jeremy Shor
BY: JUSTIN S. WEDDLE
JULIA I. CATANIA

(Case called)

THE DEPUTY CLERK: Counsel, please state your name.

MS. GRISWOLD: Good morning. Andrea Griswold and Josh Naftalis for the government, and we are joined by Special Agent Matthew Mahaffey with the FBI.

MR. TARLOWE: Good morning, your Honor. Richard Tarlowe on behalf of Mr. Ahuja. With me is Roberto Finzi, John Del Monaco, David Friedman, and Mr. Ahuja is present as well.

THE COURT: Good morning to each of you and thank you, all.

MR. FINZI: I'm so sorry I was late. I didn't realize people were waiting for me.

THE COURT: Sir, it's okay. I didn't ask the followup question that I should have. I understood you to be in the security line.

MR. WEDDLE: Justin Weddle from Weddle Law PLLC. I am here with my client Jeremy Shor, and my colleague Julia Catania.

THE COURT: Good morning to each of you. And I see others who are familiar to me from this case.

As I mentioned in the robing room, I have in recent months been in need of eyeglasses, so when I read the decision, I will take off my mask so I don't fog them up.

Let me offer just a few thoughts at the outset, recognizing what I imagine is some tense moments for everyone.

At times in this case, we have had -- I am not sure if there are moments of levity, but at least moments of civility. Because I am reading this decision, I'm not afterwards going to exchange pleasantries with you all. So let me do it at the outset.

It's been a while since we've seen each other. There has been a pandemic intervening. There's been a lot of things happening. My hope for each of you and for your families is that you have weathered this pandemic and continue to do so; that you and your families are well; and that you are finding some happiness and peace during this holiday season.

Let me also say that I am going to read this decision, and I appreciate your patience as I read it. I am asking you to have no expressions until you leave this courtroom. Someone will be happy or sad or something, but not here. Let me get through this, and then you can have whatever expressions you wish to have.

I also want to ask the parties this question. A chunk of this decision comprises legal standards that you all know, because you gave them to me. There is a section, for example, on the standards for dismissal of the indictment. There is a section also for standards for a new trial. I'd like to know from counsel the degree of detail in which I have to go. I can read you all of the quotes that I have in here, although I believe you're familiar with them. I can tell you the cases

that I was looking at and give you the pinpoint cites, I can just give you the names of the case, or I can not give any legal standards at all. It didn't make sense to me to read word for word quotes from cases that you know, but I will do what you want me to do.

So please tell me what degree of detail you would like for the legal standards.

Mr. Finzi.

MR. FINZI: As little as your Honor thinks is appropriate. We don't require anything, anything more than that. So we are not asking for cases or standards or anything your Honor feels, if your Honor feels anything can be cut out, you absolutely should proceed that way.

THE COURT: All right. Thank you.

Ms. Griswold.

MS. GRISWOLD: That's fine, your Honor. We don't need any legal standards.

THE COURT: I assumed, I didn't want to presume, but I thought it was something with which we could dispense.

MR. WEDDLE: I guess I am just not totally clear. If your Honor has written down a more fulsome description of the legal standard, and then you are not going to read it, what's going to happen to it?

THE COURT: It remains in my oral decision. It was for me guideposts as I was writing the analysis, sir. If you'd

like, I can tell you the cases that I was consulting and looking at as I give you the analysis I then give you.

MR. WEDDLE: I think it would be helpful at least to get the case name, even in a short form.

THE COURT: Of course, that's why --

MR. WEDDLE: Would your Honor consider just taking the legal standard portion and filing it as a document?

THE COURT: No, I wouldn't do that. But I'll give you the names, of course. All right. We begin.

As I do sometimes with the jury charge, I will ask you to take no offense if I don't look at you. I wrote this myself, and I've been writing this over a period of months, and it to me is more important that I read what I've written here, than that I make eye contact with you. So take no offense if I don't look at you.

I want to begin by recognizing the amount of time that has passed since the verdict, since the disclosure of information received from the FOIA request and succeeding court orders, and since briefing was concluded on this motion. I truly needed the time to give these issues the thought and the attention that they merit.

In this regard, I'd also like to speak directly to Mr. Ahuja and to Mr. Shor. I want you to understand that I did not intend or mean to cause you any needless anxiety with any delay in issuing this decision. Had this been an easy

motion -- more to the point, had this been an easy denial -- you would have heard from me sooner. My feelings on this motion have evolved over the months, and only when I revisited more of the trial record did I have the requisite confidence in my decision.

As the parties are aware, this case is currently on appeal to the Second Circuit. Federal Rule of Criminal Procedure 37 provides in these instances that the Court can defer considering the motion, deny the motion, or "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." I am quoting here from the case *United States v. Fernandez*, a summary order issued this year from the Second Circuit at 853 F.App'x 730.

For the reasons I will explain, I am denying the motion for dismissal of the indictment, but I am providing an indicative ruling that I would grant the motion for a new trial as to both defendants if the case were remanded back to me.

I find myself saying not infrequently that this motion did not need to happen, that these problems with the trial did not need to occur. And after every trial, I perform my own postmortem, and that's often with the assistance of the jury, and I consider what I could have done better as the presiding judge, what issues I could have foreseen or addressed earlier, what room, if any, there was to make the trial fairer.

What has been frustrating for me in this process is that because of the quality of counsel, the issues that bring us here this morning were raised, and I made pointed inquiries precisely to find out the information that was later revealed by the FOIA requests. I really don't know what other questions I could have asked, or what other motions defense counsel could have made, to get to the truth of the matter during the trial.

Turning now to the facts. The parties generally don't dispute what happened in the months leading up to the trial and at trial. For this reason, and because the portions that discuss interactions with the Court accord largely with my own recollection and review of the record, I am largely adopting the timelines set forth by the defense at pages 5 through 42 of their opening brief concerning both government interactions with defense counsel or the Court and internal government communications. To be clear, however, I'm not necessarily accepting the defense's spin on these facts.

My decision today springs from two disclosure issues, one macro and one micro. Beginning with the macro, the defense suggests that the government's disclosure problems were systemic, and it's hard for me to disagree with that characterization. However well-intentioned, the processes that were put in place by the government to gather, organize, and produce discoverable material did not work as they should have in this case.

To be clear, I don't think the prosecution team set out to bury discoverable information, and I do understand that hiccups in production can arise. But the issues in this case transcended mere hiccups. As detailed in the defense's opening brief, problems with disclosure were identified and discussed with the Court in January 2019, March 2019, May 2019, the weekend prior to the commencement of the trial, and at various points during the trial. The Court issued decisions on defense motions in limine based on the government's representations about the completeness of its file reviews for disclosable information, and it now turns out that this Court made decisions based on incorrect information.

The government has offered several benign explanations for the failures to disclose, including typographical errors and misfilings. But there are certain arguably less benign reasons as well, including the government's failure to retain or memorialize certain information, as well as certain restrictions that it read into my questions and my orders that simply were not there.

I also accept the defense's position that, even including adding in the materials obtained as a result of the FOIA request and the materials obtained as a result of the post-conviction motion, post-FOIA motion practice in 2020, the government's production is necessarily incomplete, because certain text messages cannot now be retrieved.

Ultimately, however, I do not find that the government systematically failed to memorialize or preserve evidence in this case. Rather, what I believe the record demonstrates is that the government repeatedly failed to identify, locate, and produce material information in accordance with its *Brady* obligations and in response to both the defense's requests and my own inquiries.

I pause here to discuss the involvement of defense counsel in ferreting out discoverable information that should have been produced in the ordinary course.

Here I'm telling you what you all already know. The criminal justice system does not presuppose that defendants will have counsel with the wherewithal and the creativity of Mr. Shor's and Mr. Ahuja's attorneys. Instead, the participants in that system assume that the government will comply with its disclosure obligations and thus ensure a fair trial. If the government is going to respond categorically that it is aware of its disclosure obligations and has complied with them, such statements have to be correct. In this case, they were not.

Relatedly, while I thought that I was able during the trial to address the material disclosed as a result of the Rule 7(c) subpoenas, the information disclosed as a result of the FOIA request calls my earlier measures into question.

To put it more bluntly: When I dismissed the jury

with my thanks in July of 2019, I was confident that I had provided all sides with a fair trial. I no longer have that confidence, and it troubles me that had the defense not filed the FOIA request, I might have persisted in a misapprehension of the trial's fairness.

I'll now turn to the more specific defense argument concerning the government's disclosures to the Court. I want to be clear here that there are two separate issues addressed by the parties in their submissions. The first is whether it is appropriate for the government to be involved in the plea allocutions of its cooperating witnesses, and the second is what was said to me about the government's involvement.

I disagree with the defense to the extent they are suggesting that the government's arguments concerning the propriety of their involvement are post hoc, fallback positions. My review of the record, and this includes both the government's contemporaneous internal communications and their submissions to me, indicates that the government consistently took the position that participation in the plea allocutions of cooperating witnesses was not improper, was not that big a deal, and was not as probative as other evidence in the case. You'll learn more about my views on this subject later on. In the continuum of impeachment evidence, I don't know that it matches Mr. Majidi's money transfers or Mr. Dinucci's looting -- for lack of a better term -- of his mother's trust

account. But I find that government involvement in the plea allocutions here was important to the prosecution team, and probative to the defense, both because of the involvement the prosecution team had, and because of the substance of what it failed to disclose, despite repeated opportunities to do so.

A key issue here is the accuracy of what was conveyed to me, and I'm going to focus for the moment on what Mr. Naftalis said to me, although it bears noting there were instances in which his trial partners could and should have spoken up.

I begin with Mr. Naftalis' statements during the June 10, 2019, mid-trial conference, and if you look back on the transcript of this day, you will see that I asked specific questions of each of the prosecutors. In the course of my discussions with Mr. Naftalis, I asked -- and I am strangely quoting myself -- "You're telling me, you're representing to me as an officer of the court that in no way did you seek to shape or modify the allocution."

Mr. Naftalis responded: "Correct. I don't remember exactly what I said, but I would never suggest to a defense lawyer, this is what he should say or not say."

After consulting with Mr. Nicholas and Ms. Griswold, Mr. Naftalis clarified that he understood the verb "shape" to mean doing something improper, and precisely for this reason I asked different questions, after explicitly remarking, "Let's

not use the term 'shape,'" and thus moving the conversation away from any normative judgments. To these questions Mr. Naftalis responded that he might encourage defense counsel to have their clients hit the elements, and that he might offer corrections to information that was factually wrong, that he did not ask Mr. Majidi's counsel to change the names of anyone in the allocution, including in particular Mr. Shor, who did not appear in the draft allocution; that there was no change in date between the two versions; and that he did not discuss Mr. Majidi's allocution with his counsel on the day of the plea proceeding.

The Court renewed these discussions on June 19, 2019, when it discussed Mr. Majidi's allocution with his counsel Seth Rosenberg. Mr. Rosenberg recalled sending a draft allocution to the government and having a conversation with Mr. Naftalis regarding the allocution, though he could not recall the specifics of that consideration. Mr. Rosenberg acknowledged a difference between the draft allocution submitted to the government and the allocution notes from which his client read during the plea proceeding. He could not recall specifically how the allocution came to be modified, though he believed the changes to be "the product of his discussions with the government." Mr. Rosenberg did not recall himself or his colleagues editing the Majidi allocution document, and his firm's records included no receipt of an e-mail from the

government with a revised allocution. He also did not recall receiving a revised allocution from the government by means other than e-mail.

Mr. Naftalis and Mr. Nicholas both stated that the government sent nothing to Mr. Rosenberg. In speaking with Mr. Nicholas, who again argued that there was nothing "improper about discussing with a defense lawyer an allocution," the Court made plain the purposes of its questioning, and again I quote myself. "Mr. Rosenberg suggested that maybe there was a possibility that the government handled the edits. So I'm allowed to ask whether they handled the edits, and I'm being told that they didn't." No one on the prosecution team corrected me. And based on the evidence now before me, someone should have.

In light of the evidence unearthed as a result of the FOIA request, I now understand that certain of the government's statements to me were misleading, and some were flat-out incorrect.

The timeline, as revised, indicates that upon receiving a draft Majidi allocution from Mr. Rosenberg on October 29, 2018, the prosecutors began discussing the draft by e-mail, and then scheduled a team meeting for 3 p.m. the following day.

In advance of the internal meeting, Mr. Naftalis circulated an edited version of the allocution in redline form.

The edits go beyond a mere directive to hit the elements. They include the replacement of a statement that the "scheme accelerated in the second half of 2015" with a statement that the scheme occurred "between 2014 and 2016"; the replacement of a statement that certain conduct was undertaken "at the direction of Neil Ahuja" with a statement that Mr. Majidi participated in the scheme with others including Messrs. Ahuja and Shor; the deletion of Mr. Majidi's acknowledgment that he pressured his traders to achieve targets; the inclusion of a reference to "funds" in the plural; and the removal of numerous details regarding the process of obtaining marks.

After the October 30 team meeting, Mr. Naftalis participated in an approximately 10-minute call with Mr. Rosenberg. The following day, Mr. Naftalis suggested a meeting with Mr. Rosenberg 10 minutes before the plea, which suggestion Mr. Rosenberg accepted. The plea allocution ultimately given by Mr. Majidi is virtually identical to Mr. Naftalis' revised allocution.

In a declaration dated February 12, 2021, Mr. Naftalis states that his recollection is not entirely refreshed by his review of the record, but believes that he may have suggested edits to Mr. Rosenberg during the October 30 telephone conference, and that when he met with Mr. Majidi and his counsel the next day, it was to discuss and sign the cooperation agreement.

On the record currently before the Court, I believe that Mr. Naftalis' statements are incorrect, and while he may have discussed the allocution with Mr. Rosenberg on October 30, he in fact provided the revised plea allocution to the defense immediately prior to Mr. Majidi's plea. It is the government's version of the allocution, and not the original draft or a draft edited by someone at the Clayman & Rosenberg firm, from which Mr. Majidi read.

And that leads me to the 800-pound gorilla in the room. Mr. Naftalis was asked specific questions regarding his practices with respect to plea allocutions, generally and in this case, and he gave me answers that I now know to be incorrect. The hardest thing for me to wrap my head around is why. I understand that trials can be stressful and that memories can differ. The fact remains that on June 10 or 19, or at any point over the ensuing several weeks, Mr. Naftalis or other members of the prosecution team could easily have checked their files and realized the inaccuracies of their representations to the Court and the defense.

In his February 2021 declaration, which is notably short on contrition, Mr. Naftalis seeks to explain himself. He acknowledges that he should have reviewed certain files, and that such review would have led him to additional disclosures and more accurate answers to the Court.

Separately, Mr. Naftalis suggests that he

misapprehended certain of my questions, such that he was responding to defense counsel's allegations of misconduct, rather than my actual questions. I do not understand how that can be the case.

My initial questions about allocutions did not bespeak agreement with defense counsel's arguments, and indeed they followed Mr. Nicholas' proffer of the government's view that there was nothing improper in such conduct. Furthermore, after answering several of my questions, Mr. Naftalis took a break, conferred with his colleagues, and offered his concerns about the use of the term "shape." I then told Mr. Naftalis, "then let's not use the term 'shape'" and proceeded to ask new, different questions about his practices, as to which there should have been no confusion.

Even if Mr. Naftalis were confused on June 10, that is no excuse for the erroneous statements made to me on June 19, nor for the prosecution team's failure to review the files and to correct these earlier statements at any point thereafter -- particularly in light of my continued reliance on these statements.

Because I don't find Mr. Naftalis' answers to be satisfying, I sketched out in a prior draft of this opinion several working theories as to why the government's answers to me were incorrect, ranging from inattention to deliberate falsity. Let me just focus on the latter, because on that

point, I have a number of hesitations.

To begin, in the scheme of all of the issues at trial, and indeed, even in the more circumcised scheme of the government's disclosure issues before and during the trial, there isn't an obvious benefit to lying about this information. And as I've noted, the government's contemporaneous e-mails suggest that they would not have been troubled by the disclosure of their participation in the allocution process. More fundamentally, I have difficulty believing that an officer of the court would lie to me, not me, qua me, but me as a federal judge, and I just don't want to believe that that happened here.

We are all shaped by our experiences. Mr. Weddle and I were, in different ways, shaped by a judicial finding of prosecutorial misconduct that we will each go to our graves thinking was unsupported by the record. A finding that Mr. Naftalis lied to a federal judge in a criminal prosecution would -- and should -- follow him throughout his professional career. On this record, I am reluctant to make that finding. Given my resolution of these motions, I don't believe that I need to. At the same time, I do not accept the reasons that have been proffered to me to date about why Mr. Naftalis said what he did.

Let me note as well there are issues with the Dinucci and Dole allocutions. I will discuss them later in this

opinion, but I don't know -- in fact, I don't believe -- that I would be granting the motion for a new trial or offering an indicative ruling in that regard on those issues alone.

Let me return to the general issue of the government's disclosures in connection with the trial. There were disclosure issues in the run-up to the trial, and certain of those issues recurred during the trial. At that time, I believed that the fairest way to approach them was to inquire as to what was being produced late and why, and then to direct the government to go back to its files, rereview everything, and certify to me that the files had been reviewed and disclosures made. With the information I have now, I question whether my efforts were fair to the defense.

Putting this in metaphorical terms, I view myself as plugging up holes in a leaking roof as each hole became apparent. And the problem I now have is I question whether there weren't more structural problems with that roof that foreclosed a piecemeal approach.

My concerns that exist today are also borne out in other cases in this district addressing problems with the government's compliance with its disclosure obligations, including Judge Castel's problems with the *Jain* case, and Judge Nathan's problems in the *Nejad* case.

The defense is correct to identify the issue as to whether these deficiencies, in the aggregate, interfered with

their right to a fair trial. Ultimately I conclude that they did.

I am now going to speak to the issue of the motion to dismiss the indictments, and I'll give you some of the cases that I looked at. Again, now that you understand the introduction to this, you have a sense of what I was focusing on.

Cases include: *United States v. Walters*, 910 F.3d 11 (2d Cir. 2018); *United States v. Brown*, 602 F.2d, 1073 (2d Cir. 1979); *United States v. Broward*, 594 F.2d 345 (2d Cir. 1979); *United States v. Percoco*, 13 F.4th 158 (2d Cir. 2021); *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989); *United States v. Brito*, 907 F.2d 392 (2d Cir. 1990); *United States v. Jain*, 2020 WL 6047812, a decision from Judge Castel from October of 2020, and the cases cited therein; and United States v. *Nejad*, 487 F.Supp.3d 206, decision from Judge Nathan from 2020.

Mr. Weddle, is that sufficient?

MR. WEDDLE: Yes, thank you, your Honor. More than sufficient. I just need the names. I can find the cites and probably already have them.

THE COURT: Thank you.

The government conduct that precipitated these motions is unacceptable, and, as I stated earlier, consistent with production failures that have plagued the government in at

least two other cases recently in this district. That said, the conduct is neither sufficiently severe nor prejudicial to warrant dismissal of the indictment.

Defendants begin by noting that the government's disclosure failures were persistent, reckless (if not intentional), and the product of a lack of "functioning process for recording, preserving and disclosing substantive communications with counsel for cooperating witnesses." I am citing here to the defense brief at page 72. There is similar language at page 76.

As noted earlier in this opinion, I agree that there were repeated failures to disclose on the part of the government, though I do not conclude that they were the product of a concerted effort to avoid disclosure obligations, such as the suggestion that the government deliberately refrained from generating written communications.

I acknowledge than these failures took place over a period of months, and it is significant to me that, despite repeated questioning from defense counsel and the Court, certain materials were only revealed as a result of heroic defense efforts, here the Rule 7(c) subpoenas and the FOIA request. Having the government quantify for me the information that has been produced is irrelevant if material information has been simultaneously withheld. That all said, I believe that the unfairness to the defense can be addressed through a

new trial, rather than the extraordinary remedy of dismissal of the indictment.

On this point, I do not accept the defense's arguments that the problems occasioned by the government's conduct or misconduct cannot be cured by a new trial. The defense suggests in this regard that a new trial would give the government an opportunity to refine its case after viewing the defense's arguments. Moreover, they add the government's deficiencies in memorializing discussions with witnesses and defense counsel suggests that no further documents will be forthcoming. Those points have merit. But they overlook the countervailing challenges for the government, which minimize the prejudice identified by the defense. To begin, the second trial will take place years after the first, and even more years from the 2014-2016 period of events at issue. Witnesses' memories have almost certainly faded. One member of the trial team has left the office. The defense has also seen the government's arguments and its evidence. And while I am deciding nothing now, I imagine that the defense would be able to make use of the evidence it has gathered post-trial, and would be able to ask me to reconsider certain of my prior in limine rulings regarding the scope of cross-examination.

Another argument for dismissal concerns the completeness and accuracy of the prosecution team's disclosures to the Court. Here, too, I am troubled, but given the fact

that I have not found actual lies to the Court, I think it is preferrable to proceed by way of a new trial. My review of the government's most recent, court-ordered productions gives me comfort that all relevant material in the government's possession, custody, or control has been now been produced. And with respect to that material that no longer exists, I believe that includes certain text messages and voicemails, or that was never memorialized, I believe those issues are better addressed by further motions in limine, and as appropriate, curative instructions from the Court.

Finally, I recognize that these events took place in the shadow of other cases in this district involving allegations of prosecutorial misconduct including the *Jain* and *Nejad* cases I cited a few moments ago. However, the conduct in those cases postdates this one, and thus I cannot say that the government should have learned from Judge Castel's or Judge Nathan's admonishments, nor do I believe that the cases, even considered in the aggregate, reflects, as *Broward* called it, "a pattern of demonstrated and longstanding widespread or continuous official misconduct." But let me be clear: The government's conduct in these three cases is unacceptable and cannot continue. The government must take appropriate steps to ensure that it meets its disclosure obligations and its duty of candor to this and all other courts. I trust that the government will do so, and that it recognizes the tools

available to courts if it does not.

Let me turn now to the motion for a new trial. There are many cases in this regard. I'll give a sampling.

Judge McMahon in *United States v. Connolly*, 2019 WL 2120022 (S.D.N.Y. May 2, 2019) contains a precis of that law. It includes such cases as *United States v. Sanchez*, 969 F.2d 1409 (2d Cir. 1992); *United States v. McCourty*, 562 F.3d. 458 (2d Cir. 2009); *United States v. Parkes*, 497 F.3d 220 (2d Cir. 2007); *United States v. Ferguson*, 246 F.3d 129 (2d Cir. 2001).

I don't believe there is a question here, no one seems to be challenging the timing of this motions, so I will skip the section of my analysis that talks about the timing of the motion.

There are certain cases that have focused on new trial motions predicated on prosecutorial misconduct. Another decision of Judge McMahon's in which these cases are summarized is *United States v. Santiago*, 2014 WL 4827883 (S.D.N.Y. Sept. 26, 2014). As for cases involving new trial on the grounds of newly discovered evidence, they are summarized in *United States v. Jones*, 965 F.3d 149 (2d Cir. 2020).

With respect to newly discovered evidence, there are certain cases summarized in a decision of Judge Preska's, *Pizzuti v. United States*, 2019 WL 10371606 (S.D.N.Y. Sept. 30, 2019); and as well, *United States v. Martinez*, 388 F.Supp.3d 225 (E.D.N.Y. 2019), which speaks about new trial motions, and,

as well, new trial motions predicated on violations of the government's disclosure obligations in cases like *Brady*.

So, again, Mr. Weddle, are you satisfied?

MR. WEDDLE: Yes, thank you, your Honor.

THE COURT: Let me please proceed to the analysis because I do believe that is more important here.

I want to begin by recognizing that these standards are difficult to meet. And I had struggles similar to I believe the defense had in categorizing the basis for a new trial. The conduct that I've identified, which includes repeated disclosure violations coupled with misleading and erroneous statements to the Court, exists at the intersection of several of these constructs. It is more than newly discovered evidence; it is more than mere impeachment; the delays in production discussed in this opinion were partly the product of government misconduct. Ultimately, given the standards I've just outlined, I think these failures to disclose and to provide accurate information to the Court are best described as *Brady* violations or disclosure violations.

What does that evidence include? My principal focus has been on the government's conduct and disclosures with respect to the Majidi allocution, as evidenced by the amount of detail with which I described that conduct in this opinion. I'm not going to repeat that information here. I would remind you of it.

As I suggested to you a little while ago, if I were only dealing with the challenges to the Dinucci and Dole allocutions, I would not be inclined to grant the motion for a new trial. But I do have some concerns about the Dinucci allocution, and I will include them here for completeness.

During trial, the government produced a previously undisclosed draft plea allocution sent to it by Mr. Dinucci's counsel, which allocution focused on the 2015-2016 time period and did not mention misconduct at PPI in 2014. During a conference outside of the presence of the jury, Ms. Griswold acknowledged advising Mr. Dinucci's counsel that she thought the accurate starting point was 2014, but recalled no other changes.

One year later, in July of 2020, the government produced an April 2017 e-mail in which one of the prosecutors requested an opportunity to speak with the cooperator's counsel, as well as a hard copy of the allocution to review. The government also produced, for the first time, a revised draft allocution that referred to mismarking beginning in 2015. At the actual plea before Judge Hellerstein, Mr. Dinucci stated that the criminal conduct occurred in or about mid-2014.

The defense argues, again with some force, that because of the government's failure to memorialize conversations with Mr. Dinucci's counsel, and the loss of certain voicemails, the truth about those edits remains

unknown. For my part, I am more troubled by the fact that the government did not search its files as I directed, but in this case stopped looking after finding the first allocution.

I am less concerned about Mr. Dole's allocution, and the record of communications regarding it doesn't inform my decision. In particular, I don't accept the defense's suggestion that something untoward or even something worthy of disclosure to the defense may have happened in brief meetings between the then-unit chiefs and Mr. Dole's counsel after Mr. Dole's guilty plea, or surrounding Mr. Dole's guilty plea.

At base, I agree with most of the defense arguments as to why these communications were material to the defense, and relatedly, why my mid-trial resolution of the defense's cross-examination requests was incorrect. Both the fact and the content of these communications with cooperators and their counsel were significant. As to the former, I think it significant that when the cooperating witnesses were thinking about the precise criminal conduct in which they had engaged, they drafted allocutions that accorded with certain defense theories and undermined portions of their trial testimony and the government's theory of the case. As to the latter, the malleability of the cooperating witnesses, plus the fact that the government had a hand in drafting at least two, if not all three allocutions, while not dispositive of any issue at trial, were proper subjects of cross-examination that I curtailed

based on incomplete and improper information.

Now, stepping back for a moment, I agree with the government that there is nothing per se improper in the involvement of prosecutors in drafting, editing, shaping the plea allocutions of its cooperating witnesses. An allocution can be inadvertently incorrect as to a date or a place or it can omit an element, like a tie to interstate commerce.

However, as with many things, allocutions and prosecutors' involvement therewith exist on a continuum, and I can think of circumstances in which either the fact of the prosecutor's involvement, or the comparison of the before and after allocutions, can constitute appropriate impeachment evidence for the jury. These circumstances include instances in which the prosecutor scripts the allocution in its entirety, or where the cooperator's initial allocution minimizes the cooperator's conduct or suggests that the cooperator does not truly believe himself to be guilty of the offense to which he is pleading, or where the initial allocution contains flat-out false statements. And after considering what has happened in this case, I think it also includes instances in which the prosecutor edits the substance of the allocution in order to preempt arguments that the government knows are at the heart of the trial defendants' defense.

My resolution of this issue during trial focused on Federal Rule of Evidence 403 issues, specifically, my concerns

that the introduction of plea allocutions could invade the cooperator's attorney-client privilege, or that I would have to provide a companion disquisition on the requirements of Rule 11. To be clear, I still have those concerns, and in many cases, the probative value of the government's involvement in the allocution won't overcome those concerns. But the facts of this case are different. The prosecutors, contrary to their representations to me, substantially edited Mr. Majidi's allocution to bolster the prosecution theory while simultaneously undermining the defense theory; they discussed the redline of that allocution internally; they met with counsel for the cooperator immediately prior to the plea to communicate the revisions. They then made analogous, though less dramatic, edit to Mr. Dinucci's allocution.

Again, to be clear, I recognize there is a difference between a plea allocution that isn't read into the record at trial, and the actual trial testimony of a cooperator. That said, shaping the allocutions in this manner deprived the defense of potentially powerful cross-examination opportunities.

Not only was the defense deprived, but so was the Court. Had I been made aware of the nature and scope of the government's involvement in Mr. Majidi's plea allocution, I would very likely have decided the issue differently, and provided the cross-examination sought by the defense.

On this point, in thinking about this, I analogize the probative value of differences between draft allocutions to statements made in proffer sessions with the government. It is sometimes the case that a proffering witness's recollection evolves, as when a putative co-conspirator's name is not mentioned in the first proffer, but is mentioned later on. That omission may be attributable to imprecise questioning by the government, or to fear, or to a genuine failure to recollect. Or, of greater concern, it could reflect the witness's desire to please the prosecutors by saying what the witness believes they want to hear. In other words, there are benign and less benign reasons why cooperating witnesses proffer as they do, but counsel for a trial defendant may be permitted to probe these issues in cross-examination, and to make credibility arguments in jury addresses. Given the Rule 403 issues just outlined, trial courts should not require cooperators to produce all drafts of their allocutions. But where the government is involved in the allocution, and the changes that result are sufficiently substantive, the defense should be permitted to probe the fact and the substance of those changes.

And that leads logically to the next issue, which is that of impeachment evidence.

I recognize, as the cases to which I referred a few moments ago make clear, that the belated disclosure of evidence

that amounts to additional impeachment material is generally not an adequate basis for a new trial. But what was withheld here was more than that. And to me, this case is closer analytically to cases like *Triumph Capital*, where disclosure was warranted.

The government often argues in this context that there was plenty of cross-examination material as to the cooperating witnesses, and that the newly disclosed information would only have been cumulative. The cooperating witnesses here had ample impeachment material on which they could be cross-examined, and defense counsel made effective use of this material at trial. There was also limited cross-examination concerning each cooperator's plea allocutions. However, the information that was withheld by the government until recently, and the information that was available at trial but as to which I precluded cross-examination, presented a qualitatively different basis of questioning.

This was a cooperator-driven case, particularly as to Mr. Ahuja. I'll concede that the government had more evidence against Mr. Shor, but I am unable to say that the evidence against him was so overwhelming that he is not entitled to a new trial here. At least two of the cooperating witnesses prepared allocutions with their respective attorneys that accorded with key defense arguments at trial. And, to repeat, while those allocutions would not have been admissible as

direct evidence at trial, it would have been reasonable for defense counsel to expect those cooperators to testify in accordance with their allocutions, and to be prepared to cross-examine the cooperators if they did not. The record, however, reflects that the government substantially redrafted Mr. Majidi's allocution, and less substantially, redrafted Mr. Dinucci's allocution, all with a view to cutting off defense arguments at trial, without the defense knowing that such arguments could have been made. The content of these changes, and the fact that the cooperators acceded to them, were fair subjects for cross-examination.

I want to return to something I said at the beginning of this opinion: These motions didn't need to happen. The disclosure issues generally, and the allocution issues in particular, were fleshed out by defense counsel before trial. The government asseverated -- categorically, repeatedly, and incorrectly -- that it knew of its disclosure obligations and had complied with them. But that wasn't quite accurate, because the prosecution team produced key information immediately prior to and during trial. I repeatedly asked the government to review its files. The prosecution team told me it had, and that everything that should have been produced had been produced. But that also wasn't quite accurate, because things were produced in June and July of 2020. And it continues to trouble me that defense counsel had to employ

extraordinary means in the form of Rule 7(c) subpoenas, FOIA requests, and court-ordered productions of material in order to force the government to comply with its disclosure obligations.

There remains the separate issue of the government's involvement in the Majidi and Dinucci allocutions. With particular respect to the former, I asked direct questions, and I received incorrect answers. I do not accept the justifications proffered by the government for these errors, and I cannot understand why the prosecution team didn't conduct a simple e-mail search during the remaining weeks of the trial to confirm or refute the representations made to me, particularly since I had made clear that my in limine decisions were predicated on those representations.

The content of these allocutions was sufficiently important, to the government at least, that at different times, prosecutors sought out allocutions from cooperator counsel, discussed them internally, conducted internal meetings regarding their contents, redlined at least one allocution, and provided edits to cooperator counsel. How they could do all of that and not disclose all of the relevant documents to the Court or defense counsel until a year after the verdict, not memorialize communications with cooperator counsel concerning these efforts, and forget that all of these happened when a district judge specifically questions them about it perplexes me to no end.

I tried my hardest to conduct a fair trial, and based on the history of disclosure problems by the government, and the incomplete and inaccurate information it provided to the defense counsel and to me during the trial, I no longer have confidence in its fairness.

Since I currently lack jurisdiction to grant a new trial, I instead advise the parties of my indicative ruling that I would grant such a motion if the case were remanded back to me.

I believe the appropriate protocol here is for the defense to promptly notify the circuit clerk of the U.S. Court of Appeals for the Second Circuit of an order that will come out later today. I'm looking at Federal Rules of Appellate Procedure 12.1 and Federal Rule of Civil Procedure 62.1. I will separately direct the clerk of court to deliver a copy of my order and of the transcript of this decision, which I presume someone is going to have transcribed, to the clerk of the United States Court of Appeals for the Second Circuit.

Relatedly, there is an open motion from Mr. Shor's counsel, it is an April 2, 2021, letter motion, to preserve for appellate review a request for monetary sanctions. That letter notes that counsel believes the record before the Court does not permit a finding that the prosecutors' actions were taken for reasons of harassment or delay under cases such as *United States v. Seltzer*, and thus the Court may not award attorneys'

fees under 28 U.S.C. Section 1927.

Independent of *Seltzer*, I don't believe that attorneys' fees are warranted in this case, but I understand the defense's desire to preserve the issue and they have done so.

I also know that there is an open motion filed by counsel for Mr. Ahuja, a pre-surrender motion for compassionate release pursuant to Section 3582(c)(1)(A) of Title 18. That motion is denied as moot.

That is the end of my opinion, and I recognize that all of you have a lot to process. The government, I imagine, will want to consider its appellate options. The defense has been directed to address certain issues to the Second Circuit. It may be the case that you would like to discuss with each other these issues before advising me of what the parties believe are appropriate next steps. I will wait to hear from you.

I am getting a bit ahead of myself, but I want to put something on your radar screens. I want you to be aware that because of a series of rollovers of trials occasioned by this district's centralized jury system, I do not have six sequential trial weeks in the entirety of 2022. So if we get to the point of a new trial, it will have to be some time in 2023. I can show you my trial calendar, but there are criminal cases and civil cases. Our criminal cases, they have the same

priority as yours. The civil are cases that have been repeatedly rolled over and they have to be tried. So, I wanted you to keep that in mind as you thought about scheduling a new trial in this case. Again, I'm ahead of myself by several steps here.

I thought about the possibility that you may decide that you would want another judge to try this case because of my schedule. And if that is something that everybody wants, you'll let me know. My sense, and it's just anecdotal from talking to my colleagues, is we all have very, very jammed up schedules for 2022 because we can only pick one jury a day in this district.

From my perspective, I've addressed everything that I want to address today. If there is anything anyone wants to bring to my attention, please do so.

Ms. Griswold, anything from the government?

MS. GRISWOLD: No, your Honor.

THE COURT: Mr. Finzi, anything from Mr. Ahuja?

MR. FINZI: No, your Honor.

THE COURT: Mr. Weddle, anything from Mr. Shor?

MR. WEDDLE: No, your Honor.

THE COURT: Thank you. We are adjourned.

(Adjourned)